

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/14/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2000-000136

FILED: _____

STATE OF ARIZONA

BARTON J FEARS

v.

DAVID W PARKER

MICHAEL J DEW

PHX MUNICIPAL CT
REMAND DESK CR-CCC

MINUTE ENTRY

This Court has jurisdiction of this misdemeanor criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda from the Appellant.

Appellant was charged with one count of Public Sexual Indecency, a class 1 misdemeanor. After a trial by jury, he was convicted on February 1, 2000 in the Phoenix City Court. Appellant was sentenced on February 1, 2001 to pay a fine of \$266.00 and to pay \$250.00 toward the costs of his court-appointed attorney. A Notice of Appeal was timely filed in this case.

Appellant claims the trial court's failure to instruct the jurors on the definition of recklessness was reversible,

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fundamental error. Appellant claims that he requested such an instruction; however, the record does not support Appellant's contention. After the trial court finished reading the jury instructions, the Court asked "is there any corrections as to the instructions as I read them to the jury?" R.T. of February 1, 2000 at page 124, lines 12-13. Counsel for Appellant answered, "No, your Honor. Thank you." Id. at line 14.

Not only does the record not disclose a specific request for a definition of recklessly or recklessness, it appears that the trial judge did not instruct the jurors on a definition of intentional or knowingly. These are the requisite culpable mental states required for commission of the offense charged. This Court will take notice that the terms intentional, knowingly, and recklessly are common terms used by laypersons in their everyday lives. The Court will presume that the average layperson would have some understanding of the meaning of those terms consistent with their legal meanings.

Rule 21.3(c), Arizona Rules of Criminal Procedure, provides that a party waives any error when they fail to request a specific jury instruction or form of verdict before the trial judge, prior to the jury retiring to consider its verdict. Arizona case law is well settled that the failure of a Defendant to object at trial to an error or omission in jury instructions waives that issue on appeal, unless the error amounts to fundamental error. State v Van Adams, 194 Ariz. 408, 984 P.2d 16, cert. denied, 120 S.Ct. 1199, 145 L.Ed.2d 1102 (1999); State v Gallegos, 178 Ariz. 1, 870 P.2d 1097, cert. denied, 115 S.Ct. 330, 513 U.S. 934, 130 L.Ed.2d 289, appeal after remand 185 Ariz. 340, 916 P.2d 1056, cert.denied 117 S.Ct. 489, 519 U.S. 996, 136 L.Ed.2d 382(1994); State v Valles, 162 Ariz. 1, 780 P.2d 1049(1989). The Arizona Supreme Court has previously defined "fundamental error" as an error that "reaches the foundation of the case or takes from the Defendant a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a Defendant to have had a fair trial". State v King. 158 Ariz. 419, 424, 763 P.2d 239,

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244 (1988). The Arizona Supreme Court has also stated that the prejudice resulting from an error not objected to by the Defendant must be analyzed in the light of the entire record. State v Gallegos, supra; State v Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981); see also State v Gendron, 168 Ariz. 153, 812 P.2d 626 (1991). And, where there is "substantial evidence in the record to support the verdict and it can be said that the error did not, beyond a reasonable doubt, contribute significantly to the verdict, reversal is not required." State v Gallegos, 178 Ariz. at 11, 870 P.2d at 1107, citing State v Thomas, 130 Ariz. at 436, 636 P.2d at 1218.

The record in this case contains significant, overwhelming evidence not only of the Defendant's guilt but of his intent. Appellant intentionally exposed his penis and engaged in a masturbatory sexual act in front of an undercover Phoenix Police officer in a public place. Further, there is no question that Appellant was reckless about whether another person would be offended or alarmed by the act as required by A.R.S. Section 13-1403(A)(1). Given this overwhelming evidence, this Court can conclude that there is substantial evidence in the record to support the jury's verdict and that any error regarding the jury instructions did not contribute significantly to the verdict beyond a reasonable doubt.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.